IN THE

Supreme Court of the United States

October Term, 1940

No. 586 15

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

v.

DOROTHEA T. FRANK,

Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR THE APPELLANT

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On Appeal from the Appellate Term of the Supreme Court of the State of New York

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BRIEF FOR THE APPELLANT

OPINION BELOW

The only opinion in this case was that of the Municipal Court of the City of New York (R. 28-35), which has not been reported. The Appellate Term of the Supreme Court of the State of New York affirmed, without opinion.

JURISDICTION

The judgment of the Appellate Term of the Supreme Court of the State of New York was entered on June 28, 1940 (R. 41). Leave to appeal therefrom to the Appellate Division of the Supreme Court of the State of New York was denied by the Appellate Term on August 12, 1940 (R. 43) and by the Appellate Division on October 9, 1940 (R. 44). The appeal to this Court was allowed by Mr. Justice Stone on October 11, 1940 (R. 47). On October 24, 1940, the appellee filed a motion which in the alternative asked (1) that the appeal be dismissed on the ground that it involved no substantial Federal question; or (2) that the judgment of the court below be affirmed on the ground that the question involved is so wanting in substance as not to require further argument. On December 16, 1940 this Court noted probable jurisdiction.

The jurisdiction of this Court was invoked under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, Section 1 (43 Stat. 936, 937; 28 U. S. C. §344).

STATUTES INVOLVED

Section 20a of the Interstate Commerce Act, as amended by Transportation Act, 1920 (41 Stat. 494, §439; 49 U. S. C. §20a), upon which appellant relies, reads in part as follows:

> "Sec. 20a (1) That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is

subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

* * *

(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the pro-

visions of this section without securing approval other than as specified herein.

* * *

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having been first obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. * * *"

Section 143 of the New York Railroad Law (Consolidated Laws of New York, Chap. 49, §143) upon which the appellee relies reads as follows:

"The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it. * * *"

STATEMENT

This was an action brought on July 20, 1939 by the appellee in the Municipal Court of the City of New York to recover from the appellant the face amount of five unpaid interest coupons due April 1, 1939 on $5,000 principal amount of First Mortgage 5% Gold Bonds, due 1945, issued in 1895, in an aggregate principal amount of $2,500,000, by The Northern Ohio Railway Company, and allegedly guaranteed prior to issuance both as to principal and interest coupons by The Lake Erie and Western Railroad Company.

By its complaint and motion for summary judgment appellee sought to recover against appellant on the ground that it is a consolidated railroad corporation, formed in 1923 by the consolidation of The Lake Erie and Western Railroad Company and four other railroad companies (not including The Northern Ohio Railway Company); and that by virtue of Section 143 of the Railroad Law of New York (pursuant to which law, among others, the consolidation was effected) the obligations of The Lake Erie and Western Railroad Company with respect to this guaranty attached to appellant (R. 1-5, 11).

Appellant by answer and cross-motion for summary judgment contended that under Section 20a of the Interstate Commerce Act (enacted in 1920), to which it is subject, no such guaranty obligation has been or can be attached to or assumed by it in the absence of the express authorization of the Interstate Commerce Commission; and that if Section 143 of the Railroad Law of New York

be construed to impose such obligation upon the appellant in the absence of such authorization, it is repugnant to Section 20a and therefore inoperative (R. 21). The record shows (R. 19, 23, 27) that the Interstate Commerce Commission has never authorized appellant to assume the guaranty obligations here involved. It is undisputed that they have never been expressly assumed by the appellant.

The Municipal Court granted summary judgment for the appellee (R. 35). The judgment of the Municipal Court was affirmed on appeal by the Appellate Term of the Supreme Court of the State of New York, the highest court of the state in which a decision could be had (R. 41).

SPECIFICATION OF ERRORS TO BE URGED BY THE APPELLANT

The court below erred:

(1) In holding that Section 143 of the Railroad Law of New York, as applied to the facts of this case, was not repugnant to Section 20a of the Interstate Commerce Act (R. 46);

(2) In holding that Section 20a of the Interstate Commerce Act did not forbid the imposition by Section 143 of the New York Railroad Law, upon interstate carriers consolidated under the laws of New York, of obligations in respect of the securities of their constituent companies, the assumption of which obligations had not been approved by order of the Interstate Commerce Commission as provided in said Section 20a (R. 46).

SUMMARY OF ARGUMENT

Section 20a (2) makes it unlawful for any carrier to issue any security or "*assume* any obligation or liability as * * *guarantor * * * or otherwise in respect of the securities of any other person * * * even though permitted by the authority creating the corporation * * * unless and until * * * the Commission by order authorizes such issue or assumption." (Italics supplied.) Any obligations assumed without such authority are made void by Section 20a (11). The question presented is whether the word "assume" as used in Section 20a includes the attachment of constituents' obligations to a consolidated corporation upon its consolidation under state law.

The generally accepted meaning of the word "assume" includes the attachment of obligations pursuant to the consolidation laws of a state. Judges and lawyers have always spoken of liabilities so attaching as liabilities which are "assumed" by the consolidated corporation. This Court, in speaking of a statute similar to the consolidation law here involved, said that by virtue of the statute "the new company formed by the act of consolidation assumed all of the obligations of the old company * * *." *Bailey* v. *Railroad Co.*, 22 Wall. 604, 630 (See also cases cited *infra*, p. 11).

The related provisions of Section 20a also indicate that it was the intention of Congress to give the Interstate Commerce Commission plenary and exclusive powers of regulation over all obligations with respect to the securities of carriers, including those assumed by a corporation upon consolidation.

An examination of the legislative history of Section 20a shows that Congress was specifically aware of the evils which had resulted from the assumption of obligations upon the consolidation of railroad corporations and intended that the broad inhibitions of the section should include such assumptions.

The administrative construction placed upon Section 20a by the Interstate Commerce Commission also supports the view of the appellant that the word "assume" as used in that section includes the attachment of obligations to a consolidated corporation upon its consolidation under state law.

ARGUMENT

Section 20a of the Interstate Commerce Act makes it unlawful for a carrier to assume any obligation in respect of securities unless and until the Interstate Commerce Commission authorizes such assumption; and the attachment of obligations and liabilities of constituents to a consolidated corporation, pursuant to state laws, is an assumption within the meaning of that section.

Section 20a (2) of the Interstate Commerce Act (*supra*, p. 3) makes it unlawful for any carrier to issue any security or "to assume any obligation or liability as * * * guarantor * * * or otherwise, in respect of the securities of any other person * * * even though permitted by the authority creating the corporation, unless and until * * * the Commission by order authorizes such issue or assumption."

Section 20a (11) (*supra*, p. 4) makes any such obligation or liability assumed by a carrier void if authorization for such assumption is not first obtained from the Interstate Commerce Commission.

Appellant was organized as a railroad corporation for the purpose of engaging in and is engaged in interstate transportation by railroad (R. 18), and so at all times since its incorporation it has been a carrier within the meaning of Section 20a of the Interstate Commerce Act.

Appellant has never been authorized by the Interstate Commerce Commission to assume the guaranty obligations of its constituent, The Lake Erie and Western Railroad Company (R. 19, 23, 27); and it is undisputed that the appellant has never expressly assumed these obligations (R. 21, 23, 27).

1. *The meaning of the word "assume"*

The appellee contended and prevailed below on the ground that obligations and liabilities with respect to securities which attach by virtue of consolidations under the Railroad Law of New York (particularly Section 143 thereof) are not obligations or liabilities "assumed" as that term is used in Section 20a. The court below reasoned that the word "assume" connotes a voluntary action; that the attachment of liability under Section 143 of the Railroad Law of New York is not voluntary; and that, therefore, it is not within the purview of "assumptions" under Section 20a.

We submit that this reasoning is not sound. Were it not for Section 20a, it is clear that upon consolidation the liabilities and obligations of the constituent companies would have attached to the consolidated company as the result of voluntary action. In this case the consolidation was effected, under statutes of five states, by and pursuant to a written Agreement and Articles of Consolidation.

This agreement was not formally executed by appellant, but only by its constituent corporations. Nevertheless, just as a certificate of incorporation, executed by incorporators and not by the corporation thereby created under the laws of a single state, is, together with the applicable provisions of such laws, the charter of that corporation and a contract between it and the state, so said Agreement and the applicable provisions of the laws of any one of the said five states became, in that state, appellant's charter and a contract between it and the state. Just as a corporation assumes the obligations of its certificate of incorporation, including the applicable rules of law, by commencing to do business as a corporation, so the appellant voluntarily assumed the obligations to which it became subject under the consolidation agreement and applicable law, by commencing to do business as a consolidated corporation. Of this contract between the appellant and the State of New York, Section 143 (to the extent that it had not been superseded by Section 20a) was, therefore, a part—so that appellant thereby took upon itself (to that extent) by voluntary action, the debts and liabilities of its constituent corporations. Even, therefore, if Section 20a has application only to obligations voluntarily assumed, it clearly applies to an assumption pursuant to Section 143, for the nature of such an assumption is in fact voluntary.

In the second place, even if the attachment of obligations provided for in Section 143 be not viewed as entirely voluntary in its nature, we submit that it is nevertheless an "assumption" as that term is commonly understood

in legal parlance. Judges and lawyers have always spoken of liabilities which attach to consolidated corporations by virtue of state laws as being liabilities "assumed" by them. This Court in speaking of an earlier New York statute similar to Section 143 of the Railroad Law said that by virtue of the statute "the new company formed by the act of consolidation assumed all of the obligations of the old company * * *" and that it was decided in *Prouty* v. *Lake Shore & Michigan Southern Railway Co.*, 52 N. Y. 363 (1873) that "the consolidated company in such a case becomes responsible for the debts and liabilities of the old company only by virtue of the assumption of those obligations as part of the terms of consolidation." *Bailey* v. *Railroad Company*, 22 Wall. 604, 630 (1874). So too, in *Polhemus* v. *Fitchburg R. R. Co.*, 123 N. Y. 502, 509 (1890), the New York Court of Appeals spoke of "the debts and liabilities, which are assumed by the new corporation" under such a statute. Other courts have also described the attachment of obligations under similar consolidation laws as "assumptions".

See:

Paine v. *Lake Erie Louisville R. Co.*, 31 Ind. 283, 349 (1869);

Jeffersonville, Madison & Indianapolis R. Co. v. *Hendricks*, 41 Ind. 48, 61 (1872);

Louisville, New Albany & Chicago Ry. Co. v. *Boney*, 117 Ind. 501; 20 N. E. 432, 433 (1889);

Snyder v. *New York, Chicago & St. Louis R. Co.*, 118 Ohio St. 72, 77; 160 N. E. 615, 617 (1928);

Toledo, St. Louis & Kansas City R. Co. v. *Continental Trust Co.*, 95 Fed. 497, 522, 524 (C. C. A. 6th, 1899);

Wabash, St. Louis & Pacific Ry. Co. v. *Ham*, 114 U. S. 587, 595 (1885).

As an example of the commonly accepted meaning of the term "assume" among lawyers, we need go no further than to point out that appellee's complaint in the very case at bar alleges that the liability in question was "assumed" (R. 1-5).

Appellant's position is supported not only by the current legal usage of the term "assume" but also by analysis and consideration of the context and purpose of the related provisions of Section 20a.

2. *Related provisions of Section 20a*

The several related provisions of Section 20a indicate that it was the intention of Congress to give the Interstate Commerce Commission plenary and exclusive powers of regulation with respect to the security obligations of carriers.[1]

Section 20a (7) (*supra*, p. 3) expressly declares the jurisdiction of the Commission to be "exclusive and plenary". Any securities issued or obligations with respect to securities assumed without approval of the Commission are declared to be "void". Indeed, even if approval of the Commission is obtained, such issues or assumptions are prohibited and made void if not made in accordance with all the terms and conditions of the order of authorization.

[1]See discussion in Shartman, *The Interstate Commerce Commission*, vol. 1, pp. 91-94, 191-193.

Only the issuance of short-term notes maturing within not more than two years and aggregating not more than 5% of the par value of the carrier's outstanding securities does not require prior approval of the Commission; and even as to such short-term notes carriers must keep the Commission promptly and fully informed (Section 20a (9), (10)).

If the obligations with respect to securities involved in the case at bar are not within the purview of Section 20a, they appear to be the only class of obligations not brought within the control of the Commission by the statute. It does not seem possible that Congress should have made provisions for such relatively inconsequential obligations as short-term notes for an aggregate of less than 5% of the carrier's outstanding securities and yet have made no provision whatever for the regulation or control of the much greater obligations which might attach by virtue of consolidations under state law.

Section 20a (2) sets up the factors to be taken into consideration by the Commission upon application for leave to issue securities or assume obligations with respect thereto. The Commission must find: (1) that the transaction is for some lawful object within the carrier's corporate purposes; (2) that it will be "compatible with the public interest"; (3) that it is "necessary or appropriate for or consistent with the proper performance * * * of service to the public as a common carrier"; and (4) that it will not "impair its ability to perform that service." Given such a broad grant of power with standards so explicitly related to the public interest, we submit that Congress

could not have intended that a large class of obligations with respect to securities, without regard to their effect upon the public interest, should be outside the purview of the statute merely because they attached to the carrier upon its consolidation under state laws.

It would be a mockery for the Interstate Commerce Commission carefully to consider whether a railroad shall be permitted to assume a single obligation with respect to securities, if without reference to the Interstate Commerce Commission and without being subject to its approval, a group of railroads could be consolidated under state laws and the consolidated railroad be burdened with a mass of such obligations, fixed and contingent, of the weaker roads consolidated. We submit that Congress intended no such result; and Section 20a should not be so construed.

3. *The purpose of the legislation*

An examination of the legislative history of Section 20a confirms the view that the issuance of securities and the assumption of obligations with respect to securities upon consolidation were intended by Congress to be within the purview of Section 20a.

Section 20a was added to the Interstate Commerce Act by the Transportation Act, 1920. In submitting the Transportation Act, 1920 to the House of Representatives, Mr. Esch, the Chairman of the Committee on Interstate Commerce, made the following statement with regard to what is now Section 20a:

> "In section 437 we cover what is known as the stock and bond features of the bill. The House is familiar with this part of the bill, because on three

prior occasions it has adopted almost this identical legislation: First, in 1910 when we had this provision attached to the Mann-Elkins Act of that year; again, in 1914, when the House passed the bill containing provisions now contained in this bill; again, in 1916, when the gentleman from Texas (Mr. Rayburn) presented in a bill the same provisions we are now about to consider. His bill was reported favorably by the committee and passed by an overwhelming vote. All three of these efforts of the House failed in the Senate.

"If our bill of 1914—and perhaps of 1910, but especially of 1914—had been enacted into law, in my opinion we would not have had the shameful financial record of the Frisco, the Rock Island, the Pere Marquette, and the New Haven, had we given the commission the power we seek to give it now. Hereafter, under this bill there shall be no issue of stocks or bonds without a certification from the commission that they are necessary and needful in the public interest" (58 Cong. R. 8317-8318).

The financial history of the railroads to which Mr. Esch referred shows that one of the evils of their operations was the issuance of excessive amounts of securities or the assumption of excessive security obligations in order to acquire new lines. (See for example, *Financial Investigation of N. Y., N. H. & H. R. R. Co.*, 31 I. C. C. 32, at pages 41-43 (1914); *St. Louis and San Francisco Railroad Investigation*, 29 I. C. C. 139, at page 150 (1914).)

Obviously there are a number of ways in which a railroad may issue an excessive amount of securities or assume excessive security obligations in order to acquire new lines. For example, the securities may be issued or the obligations

assumed as the result of the purchase of physical properties or stock, or of a merger or consolidation. The legislative history referred to by Mr. Esch reveals that Congress was cognizant of all these possibilities and that Section 20a was designed to guard against them.

It also appears that Congress was aware of the specific problem presented by corporate consolidations. Thus, in the Mann-Elkins Bill of 1910 referred to by Mr. Esch, the assumption of liabilities of constituents by consolidated corporations was specifically adverted to. This Bill contained two specific pertinent provisions: Section 16 which required the approval of the Interstate Commerce Commission as a prerequisite to the issuance of securities generally; and Section 17 which required the approval of the Commission as a prerequisite to the issuance of securities in connection with reorganizations and *consolidations in which the consolidated company assumed the liabilities of its constituents.* The provision dealing with the latter situation reads as follows:

> "*In case two or more railroad corporations subject to the provisions of this Act, as amended, shall be consolidated or merged pursuant to the laws of a State or States applicable thereto,* and such consolidation or merger shall consist in uniting the organizations, properties, businesses, and stocks of said corporations; and if the Interstate Commerce Commission shall have ascertained and stated in a certificate issued by it * * * that the stock to be issued by such consolidated *corporation and the bonds and other obligations, if any, to be assumed and issued thereby* does not exceed the fair estimated value of the properties of such consolidated corporation.

> nothing in this Act contained shall be deemed to prohibit the issue of such stock and bonds and other obligations, or any of them, *or the assumption of all or any of the bonds or other obligations of the corporations so consolidated* or merged" (61st Congress, 2d Session, H. R. 17536). (Italics supplied.)

In so far as the Mann-Elkins Act was concerned with assumptions of obligation, it dealt only with such assumptions as resulted from the consolidation of railroad corporations. In the subsequent bills referred to by Mr. Esch and in Section 20a of the Interstate Commerce Act, this limitation was removed and the prohibitions against assumptions of obligations were broadened to include assumptions of any obligations or liabilities "as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial" —plainly without regard to whether such assumptions were the result of consolidations or other transactions.

Thus it appears (1) that in Section 20a Congress adopted language which it intended to embrace any assumption of obligation with respect to securities, and (2) that in using this broad language Congress was aware of the evil which had resulted from the assumption of obligations upon the consolidation of railroad corporations and intended that its broad language should include such assumptions.

This Court, in speaking of the purpose of Section 20a, has well said:

> "The purpose of Congress to prevent interstate carriers from incurring expense which will lessen their ability to perform well their interstate func-

> tions is further shown in §439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of §20a. This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds or other evidence of indebtedness and forbids approval unless the Commission shall find that their issue is for a lawful purpose, is compatible with the public interest, is appropriate and necessary to the discharge of its public duty as a common carrier and will not impair its ability to perform that service. This is of course *in pari materia* with the restriction of paragraph 21 of §402 [i.e. Section 1 (18) of the Interstate Commerce Act] to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties." *Railroad Commission* v. *Southern Pacific Company*, 264 U. S. 331, 347 (1924).

If the purpose of the relevant provisions of Section 20a is, as this Court has said, "to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties" the statutory prohibition against assumptions without leave of the Interstate Commerce Commission must have been intended by Congress to extend to the obligations which it is claimed the appellant here assumed. Certainly the financial ability of interstate carriers to discharge their interstate commerce duties may be affected quite as much by a mass of obligations in respect of securities which attach to them by virtue of consolidations under state laws as by obligations expressly assumed thereafter.

(4) *Administrative and judicial construction*

The administrative construction placed upon Section 20a by the Interstate Commerce Commission supports the view of the appellant that the word "assume" as used in Section 20a includes obligations which attach to a consolidated corporation by virtue of its consolidation under state consolidation laws.

In *Assumption of Obligations by L. S. & I. R. R.*, 86 I. C. C. 640 (1924), the Commission granted to a consolidated carrier formed under the consolidation laws of the State of Michigan authority to assume obligations and liabilities in respect of the securities of its two constituent companies, saying:

> "* * * Under the agreement [of consolidation] and the laws of Michigan the debts, liabilities and duties of the last two companies named [the constituent companies] attach to the applicant and are enforcible against it to the same extent and in the same manner as if originally incurred by it. The applicant accordingly seeks authority to assume obligation and liability in respect of the securities of these companies" (p. 640).

The fact that in the *L. S. & I. R. R.* case the Commission assumed jurisdiction and entered an order approving such attachment constitutes a construction of the statute which directly supports the position for which we contend. To be sure, in the *L. S. & I. R. R.* case there was an express provision in the agreement of consolidation which provided that the obligations of the constituent companies should attach to the consolidated corporations pursuant to the state consolidation law. In the case at bar, there was no

such express provision but clearly, subject to Section 20a, such a provision must necessarily be implied in any agreement of consolidation and no difference in result can be predicated upon the fact that in the one case the operation of the state consolidation law was expressly incorporated by reference and in the other case was left to implication. Clearly this is a holding that the word "assumption" as used in Section 20a includes the attachment of obligations whether such attachment results from the consolidation of corporations pursuant to state law or by reason of an agreement of consolidation which expressly provides for such attachment.

The Commission has, in fact, indicated that it does not believe that by virtue of the state statutes personal liability was imposed upon appellant in respect of security obligations of its constituents. Several years after the consolidation, the Commission, on application, granted appellant authority to assume various other such obligations. (See, for example, *New York, C. & St. L. R. Co. Assumption of Obligation*, 217 I. C. C. 598 (1936); *New York, C. & St. L. R. Co. Bonds and Assumption*, 221 I. C. C. 772 (1937).

We respectfully submit that this construction should be followed. It is supported by the language of the Section and by the legislative history. This Court has repeatedly indicated that great weight should be given to the construction consistently given to a statute by a department or Commission charged with its administration "and such construction is not to be overturned unless clearly wrong or unless a different construction is plainly required."

United States v. *Jackson*, 280 U. S. 183, 193 (1930);

United States v. *American Trucking Associations*, 310 U. S. 534, 549 (1940);

Armstrong Paint & Varnish Works v. *Nu-Enamel Corp.*, 305 U. S. 315, 330 (1938);

United States v. *Madigan*, 300 U. S. 500, 505 (1937) and cases therein cited.

The judicial constructions of Section 20a on the precise point here involved are very few. Indeed, we know of only two cases other than that at bar: *Friedman* v. *New York, Chicago & St. Louis Railroad Company* (N. Y. Supreme Court, N. Y. County, Special Term, N. Y. L. J. April 17, 1940, p. 1740); and *Missouri-Kansas-Texas Ry. Co.* v. *Mars*, 294 S. W. 941 (Tex. Civ. App. 1927).

In the *Friedman* case, the Special Term of the New York Supreme Court (a court of first instance) followed the decision of the court below in the case at bar and granted summary judgment to the plaintiff on much the same reasoning. Our appeal from this decision is now pending in the state courts.

The *Mars* case involved a Texas statute which provided that in case of the sale of the property and franchises of a railroad, the property and franchises so purchased should be "charged with and subject to" all subsisting liabilities of the seller for damage to property. The Texas Court of Civil Appeals held (1) that this statute provided for the assumption of such liabilities by operation of law, and (2) that the plaintiff must allege in his complaint that the assumption was authorized by the Interstate Commerce Commission. The decision of the Texas Court is there-

fore a direct holding that no liability attaches by operation of state law unless and until the assumption of liability is expressly authorized by the Commission.

While this decision was reversed by the Texas Commission of Appeals (298 S. W. 271 (1927)) and this judgment of reversal was affirmed by the United States Supreme Court (278 U. S. 258 (1929)), the reversal was on other grounds, leaving unaffected the Texas Court of Civil Appeals' conclusion as to the point here involved.

Despite the paucity of authority precisely in point, the decision of this Court in the closely analogous case *Railroad Commission* v. *Southern Pacific Company*, 264 U. S. 331 (1924), supports our position. There this Court had occasion to consider the meaning of Section 1 (18) of the Interstate Commerce Act, which provides:

> "* * * no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, * * *" (41 Stat. 477).

The California State Railroad Commission had ordered the defendant interstate railroads to establish a new union terminal and to construct lines leading to that terminal. No application was ever made to the Interstate Commerce Commission under Section 1 (18). This court held that the California Commission's order was inoperative until

the Interstate Commerce Commission acted under Section 1 (18).

The facts in the *Southern Pacific* case seem analogous to those in the case at bar. There the statute forbade the railroad to "undertake" certain construction without the approval of the Interstate Commerce Commission. Here Section 20a forbade the railroad to "assume" obligations in respect of securities without the authorization of the Interstate Commerce Commission. In each case the duty or obligation of the railroad was imposed by state authority. If the involuntary origin of the duty in the *Southern Pacific* case was not enough to remove it from the exclusive jurisdiction of the federal agency over "undertakings" it follows that even if the present defendant's "assumption of liability" be viewed as in a sense involuntary, that would not remove it from the exclusive jurisdiction of the federal agency over "assumptions" of security obligations.

The *Southern Pacific* case is but one of many in which this Court and other courts have held that state statutes regulating interstate carriers, which are in similar conflict with the policy of Section 20a and other provisions of the Interstate Commerce Act, must yield to the paramount regulatory power of Congress. *New York Central Securities Corp.* v. *United States*, 54 F. (2d) 122 (S. D. N. Y., 1931), aff'd 287 U. S. 12 (1932); *Texas* v. *United States*, 292 U. S. 522 (1934); *People* v. *New York Central R. Co.*, 233 N. Y. 679 (1922); *Whitman* v. *Northern Central Ry. Co.*, 146 Md. 580, 127 Atl. 112 (1924).

CONCLUSION

For the reasons stated and on the authority of the cases cited above, we respectfully submit that the judgment of the lower court should be reversed.

Respectfully submitted,

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